

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Atlantic Broadband (Penn) LLC	)	
	)	CSR 6339-E
Petition for Determination of Effective	)	
Competition in the Town of Great Valley	)	
(NY0316), the Village of Little Valley (NY0565)	)	
and the Town of Salamanca, New York (NY0371)	)	
	)	
Petitions for the Reconsideration of the	)	
Certification of the Town of Little Valley	)	
(NY0564) and the City of Salamanca (NY0021)	)	
New York to Regulate Basic Cable Service Rates	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 8, 2007**

**Released: March 9, 2007**

By the Deputy Chief Media Bureau:

**I. INTRODUCTION**

1. Atlantic Broadband (Penn) LLC ("Atlantic") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in the following New York communities: (1) the Town of Great Valley; (2) the Town of Little Valley; (3) the Village of Little Valley; (4) the City of Salamanca; (5) and the Town of Salamanca.<sup>1</sup> Atlantic alleges that its cable systems serving the captioned areas are subject to effective competition pursuant to Sections 623(l)(1)(a) & (b) of the Communications Act of 1934, as amended ("Communications Act")<sup>2</sup> and therefore exempt from cable rate regulation. Atlantic also has filed pursuant to Sections 76.911(a)(1) and 1.106 of the Commission's rules petitions for reconsideration of the Commission's grant of franchising authority to the City of Salamanca and the Town of Little Valley.

2. Given the complex sequence of events surrounding these petitions, a summary of the pleadings follows. Initially, Atlantic filed an effective competition petition for all of the five localities listed in the above caption.<sup>3</sup> Only the Town of Salamanca, the City of Salamanca and the Town of Little Valley opposed that petition.<sup>4</sup> Two of those opponents, the City of Salamanca and the Town of Little Valley, took the additional step of requesting that the authority to regulate basic cable rates be transferred

<sup>1</sup>See 47 C.F.R. §§ 76.7(a)(1), 76.905(b)(1)&(2), 76.907.

<sup>2</sup>See 47 U.S.C. §§ 543(l)(1)(A) & (B).

<sup>3</sup> Petition for Special Relief for the Town of Great Valley, the Town of Little Valley, the Village of Little Valley, the City of Salamanca and the Town of Salamanca, New York (filed May 20, 2004) ("Petition").

<sup>4</sup> Opposition to Petition for Special Relief for Determination of Effective Competition, Filed by the City of Salamanca, the Town of Salamanca and the Town of Little Valley (filed July 30, 2004) ("Opposition").

from the New York Public Service Commission (“NYPSC”) to their own local government.<sup>5</sup> In early July 2004, those two localities obtained the transfer of authority from the NYPSC, and filed FCC Form 328 with the Commission.<sup>6</sup> Thirty days after filing that form, the two localities’ authority to regulate basic cable rates became effective.<sup>7</sup> Atlantic subsequently filed timely petitions for reconsideration of the City of Salamanca and the Town of Little Valley’s newly granted authority.<sup>8</sup> Atlantic contended that its petitions for reconsideration were based on its assessment that effective competition existed in both localities, and attached its original petition for effective competition in support of that view.<sup>9</sup> Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.<sup>10</sup> Cable operators filing petitions for reconsideration on the grounds of effective competition must prove that they face competition under one of the four tests set forth in Section 76.905 of the Commission’s rules.<sup>11</sup> Both localities opposed Atlantic’s petitions for reconsideration and requested that the stay on their authority to regulate rates be lifted.<sup>12</sup> As discussed below, we grant Atlantic’s petitions for effective competition in the Town of Great Valley, the Village of Little Valley, and the Town of Salamanca, New York. We also grant Atlantic’s petitions for reconsideration of certification with respect to the City of Salamanca and the Town of Little Valley.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>13</sup> as that term is defined by Section 76.905 of the Commission’s rules.<sup>14</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>15</sup>

---

<sup>5</sup> Request for Leave to Correct the Record and Response to Replies, Filed by the City of Salamanca, the Town of Salamanca and the Town of Little Valley at 2 (Sept. 27, 2004) (“Opponents’ Response”).

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.* at 3 & n. 8; *see also* 47 C.F.R. §76.910.

<sup>8</sup> *See* Petition for Reconsideration of the City of Salamanca For Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition (Aug. 6, 2004) (“City of Salamanca Petition for Reconsideration”); Petition for Reconsideration of the Town of Little Valley For Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition (Sept. 8, 2004) (“Town of Little Valley Petition for Reconsideration”).

<sup>9</sup> City of Salamanca Petition for Reconsideration at 1-2 & Exh. B; Town of Little Valley Petition for Reconsideration at 1-2 & Exh. B.

<sup>10</sup> 47 C.F.R. §76.911(b).

<sup>11</sup> 47 C.F.R. §§ 76.911 & 76.905.

<sup>12</sup> City of Salamanca Opposition to Petition for Reconsideration at 3-4; Town of Little Valley Opposition to Petition for Reconsideration at 2-3. The Commission discusses the localities’ arguments with respect to finding effective competition below. As to the City of Salamanca and Town of Little Valley’s request to lift the stay, our rules do permit challenges to a petition for reconsideration alleging the presence of effective competition when the petition is based on a frivolous finding. *See* 47 C.F.R. §76.911(c). Though both localities discuss the frivolous basis exception, they provide no evidence which shows that Atlantic’s evidence is frivolous. Opponents’ Request at 7-9 (“The Commission established safeguards, in the form of severe penalties, against ‘frivolous’ filings of the Petitions for Reconsideration which alleged effective competition, on the grounds that the stay could hurt consumers by delaying protections which guarded against monopoly abuses which had developed due to an absence of effective competition”). Accordingly, both requests to lift the stay on authority to regulate rates are denied.

<sup>13</sup> 47 C.F.R. § 76.906.

<sup>14</sup> 47 C.F.R. § 76.905.

<sup>15</sup> *See* 47 C.F.R. §§ 76.906 & 76.907.

## II. DISCUSSION

### A. Low Penetration Effective Competition: Town of Little Valley

4. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system."<sup>16</sup> As noted above, we analyze Atlantic's petition for reconsideration based on whether effective competition exists in the Town of Little Valley.<sup>17</sup> In its petition, Atlantic states that approximately 10 percent of households in the Town of Little Valley subscribe to Atlantic's service.<sup>18</sup> Atlantic derived this figure by dividing the number of total subscribers by the total number of franchise households from the 2000 U.S. Census.<sup>19</sup>

5. In Opposition, the Town of Little Valley contends that Atlantic defined its franchise area too broadly, which improperly skewed its penetration figures.<sup>20</sup> In support of this view, the Town of Little Valley states that, when calculating penetration under the low penetration test, localities can redefine the boundaries of a franchise authority in certain exceptional circumstances. Specifically, the locality contends that a cable operator that makes an "affirmative decision" to restrict service "logically redefines its franchise area."<sup>21</sup> The locality contends that Atlantic made an affirmative decision to redefine the franchise area when it agreed to a term in its franchise agreement that requires customers in low-density areas to pay contribution-in-aid-of-construction fees in order to receive service.<sup>22</sup> It also submitted a declaration from a responsible official, which stated that the contribution-in-aid-of-construction costs "have been prohibitive (thousands of dollars)."<sup>23</sup> Furthermore, the Town also contends that it receives cable service only because Atlantic's cable plant passes through the Town of Little Valley en route to more populous areas.<sup>24</sup> Based on this evidence, the Town of Little Valley contends that Atlantic should not have calculated its penetration rate based on data from the entire franchise area, and that "actual cable penetration is likely well above 60%."<sup>25</sup>

---

<sup>16</sup> 47 U.S.C. § 543(l)(1)(A).

<sup>17</sup> 47 C.F.R. § 76.911.

<sup>18</sup> Town of Little Valley Petition for Reconsideration, Exh. B (Petition for Special Relief) at 6 & at Exh. I.

<sup>19</sup> *Id.*, Exh. B at Exh. I. Atlantic stated that 71 subscribers existed in the Town of Little Valley, and divided that number by the number of total franchise households from the 2000 U.S. Census (688).  $71/688 = 10.3$  percent.

<sup>20</sup> Opposition at 12-13; Opponents' Response at 15-17.

<sup>21</sup> "Accordingly, [the Commission] will permit franchise authorities to demonstrate the boundaries of such a redefined franchise area." Opposition at 12-13 (citing *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking* at ¶5, MM Docket No. 92-966 (Aug. 27 1993) ("Cable Television Order")). We note that the correct citation is MM Docket 92-266. *Id.*, 9 FCC Rcd 1164, 1167-68 ¶4. See also Oppositions' Response at 16 n. 62 (citing to Opposition at 12-13).

<sup>22</sup> Opposition at 14, Exh. 5 (§3.06 of Atlantic's franchise agreement with the Town of Little Valley); Opponents' Response at 15-16.

<sup>23</sup> Opposition at Exh. 5 (Declaration of Supervisor, Town of Little Valley); Opponents' Response at 15-16 (referencing Opposition at Exh. 5). The Town also submitted a population density map. Opposition at Exh. 5 (Map Showing Housing Units Per Census Block).

<sup>24</sup> Opposition at 13 & Exh. 5.

<sup>25</sup> Opposition at 14; Opponents' Response at 17 (stating that "Atlantic has redefined its franchise area, where it likely serves upwards of 70 percent of the homes passed by its plant.").

6. Atlantic counters that it calculated its penetration rate correctly, based on data from the entire franchise area.<sup>26</sup> First, it states that the Town of Little Valley incorrectly argues that only those areas passed by a cable system constitute the franchise area for purposes of the low penetration test.<sup>27</sup> Atlantic argues that this interpretation contradicts Commission precedent and the plain language of the 1992 Cable Act.<sup>28</sup> Second, it states that the franchise agreement language requiring line extension fees in return for building in low density areas does not qualify as an “affirmative decision” to restrict service.<sup>29</sup> Instead, Atlantic reaffirms that it is legally authorized to serve the entire locality, and is willing to do so for a line extension fee where appropriate under the terms of the franchise agreement.<sup>30</sup>

7. We find that Atlantic’s calculations based on the *entire* franchise area of the Town of Little Valley are correct. As we have stated previously, Atlantic’s failure to build out the entire franchise area does not, on its own, constitute an affirmative decision to restrict service.<sup>31</sup> Nor has the LFA proven with other evidence that Atlantic has made an affirmative decision to restrict service. Though Atlantic’s provision of service to less-populated areas requires additional fees, and those fees allegedly run into the thousands of dollars, no evidence submitted in the record shows that Atlantic has made an affirmative decision not to comply with the terms of service in its franchise agreement. In fact, the locality’s own evidence indicates that Atlantic has offered to provide service to the less-populated areas of the Town of Little Valley, on terms agreed to by the franchising authority.<sup>32</sup> Thus, Atlantic has provided information showing that fewer than 30 percent of the households within Town of Little Valley subscribe to its cable service. Based on this record, we conclude that Atlantic has demonstrated the existence of low penetration effective competition under our rules in the Town of Little Valley.

## **B. Competing Provider Effective Competition**

### **i. Town of Great Valley, Village of Little Valley and Town of Salamanca**

8. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>33</sup>

<sup>26</sup> Town of Little Valley Petition for Reconsideration, Exh. B (Reply in Support of Atlantic Broadband’s Petition for a Declaration of Effective Competition) at 6 (“Reply Exhibit for Town of Little Valley Petition for Reconsideration”).

<sup>27</sup> *Id.* “The Commission defines a ‘franchise area... as the area a system operator is *authorized* to serve in the franchise’ – *not* as the area passed by cable plant” (citing *In re Century Cable of Northern California, Petition for Revocation of the Certification of the City of San Buenaventura to Regulate Basic Cable Rates*, Memorandum Opinion and Order, 13 FCC Rcd 24153, 24161-62 ¶20 (1998)) (emphasis in the original).

<sup>28</sup> *Id.*

<sup>29</sup> Reply Exhibit for Town of Little Valley Petition for Reconsideration at 7-8.

<sup>30</sup> *Id.* at 8, n. 28.

<sup>31</sup> *Cable Television Order*, 9 FCC Rcd at 1180 ¶¶ 24-25.

<sup>32</sup> Opposition at Exh. 5 (Declaration from Town of Little Valley Supervisor). The declaration indicates that Atlantic will serve the low density areas, though for a fee (“What we are experiencing is that residents living off Route 353 are being told there are not enough homes on their street to be provided cable service. Others who are given a price to run the lines to their homes can’t afford the cost quoted.”) *Id.*

<sup>33</sup> 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

9. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>34</sup> Atlantic has provided evidence of DIRECTV and DISH's comprehensive Internet websites and toll-free phone numbers for ordering DBS service.<sup>35</sup> In Opposition, the Town of Salamanca contends that its residents are not reasonably aware that they may purchase DBS service locally, and offer evidence in support of that view.<sup>36</sup> In Reply, Atlantic responds that the Commission has approved the use of national advertising as evidence in support of the reasonably aware standard.<sup>37</sup> We note that the two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.<sup>38</sup> In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the franchise areas are DBS subscribers in these three localities, we conclude that the population of all three franchise areas, including the Town of Salamanca, may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.<sup>39</sup> With respect to the issue of program comparability, we find that the programming of the DBS providers in those areas satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.<sup>40</sup>

10. Atlantic also offered evidence that no regulatory, technical, or other impediments to households exist within those franchise areas taking the services of the DBS providers, and that potential subscribers in those franchise areas have been made reasonably aware of the MVPD services of DirecTV and DISH.<sup>41</sup> In Opposition, the Town of Salamanca contends that technical and other impediments to taking DBS services exist. Specifically, it contends that tall trees throughout the area and mountains in the south and southwest prevent households from receiving DBS signals.<sup>42</sup> Atlantic, in Reply, states that the locality's argument suggests that "if even *one* subscriber cannot receive satellite service, such service is not 'technically available.'"<sup>43</sup> In addition, Atlantic explains that Commission precedent presumes that satellite service is available in all franchise areas.<sup>44</sup> We agree. As we have decided on previous

<sup>34</sup>See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>35</sup> See Petition at 4-5.

<sup>36</sup> Opposition at 7; Opposition's Response at 11 n. 41.

<sup>37</sup> Reply in Support of Atlantic Broadband's Petition for a Declaration of Effective Competition at 10 (citing *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5661 ¶32 (1993)) ("Reply").

<sup>38</sup> *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11, at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

<sup>39</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd at 5661 ¶ 32.

<sup>40</sup>See 47 C.F.R. § 76.905(g); see also Petition at 5-6.

<sup>41</sup>See Petition at 4.

<sup>42</sup> Opposition at 4-7; Opponents' Response at 9-11.

<sup>43</sup> Reply at 9 (emphasis in original).

<sup>44</sup> *Id.* (citing *In re HPI Acquisition Co et al, Eleven Unopposed Petitions for Determination of Effective Competition in Thirty-Seven Local Franchise Areas*, CSR Nos. 6075-E *et seq.* (June 30, 2004); *Charter Communications et al, Petition for Determination of Effective Competition in Thirteen North Carolina Communities*, 19 FCC Rcd 7003 (2004) ("Charter Communications Order").

occasions, due to its nationwide satellite footprint, DBS service is presumed to be technically available throughout the United States.<sup>45</sup> Moreover, the first prong of the competing provider test requires only that two unaffiliated MVPDs offer service to at least 50 percent of the households in the franchise area. The Town of Salamanca offers no evidence to support a finding that the two DBS providers are unable to offer service to at least 50 percent of the franchise area. We find that Atlantic has demonstrated that the Town of Great Valley, the Village of Little Valley and the Town of Salamanca are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise areas. Accordingly, we find that the first prong of the competing provider test is satisfied in the Town of Great Valley, the Village of Little Valley and the Town of Salamanca.

11. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Atlantic asserts that it is the largest MVPD in the Town of Great Valley, the Village of Little Valley, and the Town of Salamanca.<sup>46</sup> Atlantic sought to determine the competing provider penetration in the franchise areas by using a five-digit zip code allocation formula, using data from the Satellite Broadcasting and Communications Association (“SBCA”) to calculate the DBS firms’ subscribership in each franchise area.<sup>47</sup> The SBCA reports showed that there are an aggregate of 462 DBS subscribers in the Town of Great Valley, 578 in the Village of Little Valley, and 654 in the Town of Salamanca.<sup>48</sup> To account for the possibility that some households subscribe to both cable and DBS services, and to account for commercial or test accounts, Atlantic reduced each figure by 10 percent.<sup>49</sup> Atlantic multiplied these figures with the derived allocation percentages to calculate the total number of subscribers allocated to the franchise areas.<sup>50</sup> It then divided that number by the total number of franchise households from 2000 U.S. Census data.<sup>51</sup> Based on this method, Atlantic showed that the competing provider penetration rate in the Town of Great Valley is 52 percent, in the Village of Little Valley is 46 percent, and in the Town of Salamanca is 19.5 percent.<sup>52</sup>

12. In Opposition, the Town of Salamanca contends that Atlantic’s penetration calculations are inaccurate because they include satellite subscribers from areas outside the franchise area.<sup>53</sup>

<sup>45</sup> *In the Matter of Texas Cable Partners, L.P.*, Memorandum Opinion and Order, 16 FCC Rcd 4886, 4887 ¶ 3 (2001).

<sup>46</sup> Petition at 7.

<sup>47</sup> *Id.* at 8-9, Exh. G & H.

<sup>48</sup> *Id.* at Exh. G & H.

<sup>49</sup> Petition at 9, Exh. H. Reducing subscriber totals by 10 percent, the Town of Great Valley has 416 subscribers, the Village of Little Valley has 520, and the Town of Salamanca has 589. Further discussion regarding the 10 percent reduction for dual subscribers follows. *See infra.*, ¶ 23.

<sup>50</sup> Petition at 8-9, Exh. H. The allocation percentages were derived by dividing the total number of franchise households (based on 2000 U.S. Census data) by the total number of five-digit zip code households (also based on data from the 2000 U.S. Census). Petition, Exh. H. The allocation percentage for the Town of Great Valley was 100 percent, for the Village of Little Valley was 38 percent, and for the Town of Salamanca was 7 percent. Thus, the total direct-to-home subscribers allocated to the franchise area for the Town of Great Valley was 416 (100 percent x 416), for the Village of Little Valley was 198 (38 percent x 520), and for the Town of Salamanca was 41 (7 percent x 589).

<sup>51</sup> Petition, Exh. H. The total number of franchise households for the Town of Great Valley was 798, for the Village of Little Valley was 427, and for the Town of Salamanca was 210.

<sup>52</sup> *Id.* (Town of Great Valley  $416/798 = 52$  percent, Village of Little Valley  $198/427 = 46$  percent, Town of Salamanca  $41/210 = 19.5$  percent).

<sup>53</sup> Opposition at 8-9; Opponents’ Response at 12. As noted above, the Town of Great Valley and the Village of

(continued....)

Therefore, the Town of Salamanca submitted an alternative DBS penetration rate, calculated from zip code+4 data it purchased from SBCA.<sup>54</sup> The zip code+4 data, according to the Town of Salamanca, is better than the five-digit zip code data that Atlantic used because the plus four data limits the count to those households located in the franchise areas.<sup>55</sup> In addition, the locality noted that the Commission has accepted arguments based on zip code+4 data previously.<sup>56</sup> Using this method, the Town of Salamanca calculated an 11.9 percent DBS penetration rate, which falls below the 15 percent threshold.<sup>57</sup>

13. In Reply, Atlantic counters that the Commission should accept Atlantic's methodology because it has done so previously and that it should reject the Town's calculations because no attempt was made "to show that the satellite subscriber numbers reported by the SBCA actually correlate with the Town of and City of Salamanca boundaries."<sup>58</sup> Atlantic contends that the Commission has approved of the five-digit zip code methodology because it results in "sufficiently accurate" and verifiable DBS penetration rate figures.<sup>59</sup> In addition, Atlantic states that the Town of Salamanca's data is inaccurate because it allegedly does not include subscriber numbers from throughout the franchise area.<sup>60</sup>

14. In Response, the Town of Salamanca submitted evidence in response to Atlantic's criticism that the town's zip code+4 data did not correlate to the locality's boundaries or reflect all of its zip codes. It submitted evidence showing that its data represented *all* of the franchise area.<sup>61</sup> As to whether it included areas outside its franchise area, the Town of Salamanca initially only submitted a declaration stating that it had used only those zip codes that fell within its borders.<sup>62</sup> The town later supplemented the record with a list of zip codes, though the list did not separate out which zip codes fell within the Town of Salamanca's borders.<sup>63</sup> The Town indicated that Atlantic could verify which zip

---

(...continued from previous page)

Little Valley did not oppose Atlantic's petition.

<sup>54</sup> Opposition at 10; Opponents' Response at 11-13.

<sup>55</sup> Opposition at 9-10; Opponents' Response at 12-13.

<sup>56</sup> Opponents' Response at 12 n. 50.

<sup>57</sup> Opposition at 10; Exh. 3.

<sup>58</sup> Reply at 15.

<sup>59</sup> *Id.* at 13 (citing *In re Charter Communications Properties LLC Petition for Determination of Effective Competition in San Luis Obispo County, California Order*, 17 FCC Rcd 4617, 4619 ¶6 (2002); *Fibervision Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313, ¶5 (2002) ("Fibervision Order")). Atlantic also contends that the 5-digit zip formula is acceptable because it does not place "undue administrative burden on cable operators or local franchising authorities." *Id.*

<sup>60</sup> "The municipalities claim to have ordered SBCA Zip + 4 data only after 'recognizing that there are physical barriers in their communities that prevent many of their residents from being able to receive satellite service.' This carefully phrased language suggests that the Municipalities' consultant requested Zip + 4 data *not* for the entire franchise areas, but only for those locations where they believe no such physical barriers exist." *Id.* at 15-16.

<sup>61</sup> Opponents' Response to Surreply at 4, n. 20; Opponents' Response at 13.

<sup>62</sup> It submitted a declaration from an employee of Action Audits, LLC, the company hired to support the Town of Salamanca in its opposition to Atlantic's petition. The employee stated that she acquired the 5+4 zip codes for the Town of Salamanca from the Board of Public Utilities of the City of Salamanca. Opponents' Response at 13, Exh. I.

<sup>63</sup> In response to Atlantic's request to obtain a list of zip codes exclusive to the Town of Salamanca, the Town provided *one* zip code+4 list for *both* the City of Salamanca and the Town of Salamanca. Atlantic Surreply at 2-3; Response to Surreply at Exh. 3; Letter from John T. Nakahata and Michael D. Nilsson, Counsel for Atlantic Broadband (Penn) LLC to Marlene H. Dortch, Secretary, FCC (Nov. 1, 2004) at 2 ("Atlantic Ex Parte").

codes fell within the Town's boundaries "simply by typing the zip code into Mapquest.com."<sup>64</sup>

15. We cannot accept the Town of Salamanca's zip code+4 calculations here because we cannot verify the accuracy of the underlying zip codes upon which the calculation was based. The Town of Salamanca fails to show that the zip codes it provided to the SBCA fall within the Town of Salamanca's boundaries. As the locality suggested, we entered the zip codes listed in the Town of Salamanca's Response to Surreply on Mapquest.com. The website did not indicate whether an individual zip code fell within the Town of Salamanca's boundaries (as opposed to the City of Salamanca).<sup>65</sup> The Town of Salamanca provides no additional evidence that allows us, or Atlantic, to verify that the zip codes it provided to the SBCA fall within its borders. Though Atlantic similarly fails to indicate which zip codes fall within the Town's borders, it compensates for that by using a Commission-approved method which creates sufficiently reliable and verifiable DBS penetration data.<sup>66</sup> By rejecting the Town's zip code+4 calculations, we are not shifting the burden of proving effective competition from Atlantic to the Town in contravention of Commission rules.<sup>67</sup> Nor are we stating a preference for one type of calculation method over another.<sup>68</sup> Instead, this decision reflects our need to ensure that we base our assessment on the best underlying data available that can be verified by interested parties and the Commission. Here, Atlantic offers evidence that the DBS penetration rate in the Town of Salamanca exceeds the 15 percent threshold, using a calculation method we have approved in the past.<sup>69</sup> The Town of Salamanca offers no specific evidence which proves that Atlantic's calculations using this method are incorrect. Instead, the Town offers an alternative, equally acceptable data calculation method, but with deficient underlying data. Decisions regarding effective competition should be based on the most accurate underlying data possible; here, that data is from Atlantic.<sup>70</sup> Thus, Atlantic has shown that the DBS penetration rate in the Town of Salamanca, like that of the Town of Great Valley and the Village of Little Valley, exceeds the 15 percent threshold.

16. We find that Atlantic has demonstrated that the number of households subscribing to programming services offered by providers, other than the largest MVPD, exceeds 15 percent of the households in the Town of Salamanca, the Town of Great Valley and the Village of Little Valley. Therefore, the second prong of the competing provider test is satisfied in those three franchise areas.

## ii. City of Salamanca

17. As noted above, Atlantic filed for effective competition status before the City of Salamanca had obtained authority to regulate basic cable rates. After the City of Salamanca obtained that authority, Atlantic subsequently filed a timely petition for reconsideration. Cable operators filing petitions for reconsideration on the grounds of effective competition must prove that they face

---

<sup>64</sup> Response to Atlantic Ex Parte at 1.

<sup>65</sup> For example, entering 14779-1809 on Mapquest pulled up a map in "Salamanca, New York." The map did not indicate whether it depicted a section of the Town of Salamanca or the City of Salamanca. See <http://www.mapquest.com> (last visited Mar. 2, 2007). A search under "Town of Salamanca" on Mapquest yielded no results. See *id.*

<sup>66</sup> *In re Bright House Networks, LLC et al, Twenty Petitions for Determination of Effective Competition in Forty-Seven Franchise Areas*, 20 FCC Rcd 15229, 15230 n. 8 (2005).

<sup>67</sup> 47 C.F.R. § 76.906.

<sup>68</sup> *Charter Communications Order*, 19 FCC Rcd at 7006 ¶ 7.

<sup>69</sup> *Id.*

<sup>70</sup> Petition at Exh. H; see also *Fibervision Order*, 17 FCC Rcd at 16314 ¶ 5.



competition under one of the four tests set forth in Section 76.905 of the Commission's rules.<sup>71</sup> For the City of Salamanca, Atlantic contends that effective competition exists under the competing provider test described above.<sup>72</sup>

18. Atlantic's competing provider analysis for the City of Salamanca mirrors its arguments for the Town of Salamanca.<sup>73</sup> It offers identical evidence in satisfaction of the first prong of that test.<sup>74</sup> In Opposition, the City of Salamanca offers counterarguments identical to those offered by the Town of Salamanca described above.<sup>75</sup> As we concluded regarding the Town of Salamanca's arguments with respect to the first prong of the competing provider test, due to its nationwide satellite footprint, DBS service is presumed to be technically available throughout the United States.<sup>76</sup> Accordingly, for the precise reasons set forth above, we find that the first prong of the competing provider test is satisfied in the City of Salamanca.

19. With respect to the second prong of the competing provider test, Atlantic submitted calculations based on a five-digit zip code allocation formula to show that the DBS penetration rate in the City of Salamanca exceeds 15 percent.<sup>77</sup> Based on this method, Atlantic showed that the penetration rate in the City of Salamanca is 19.8 percent.<sup>78</sup>

20. However, the City of Salamanca contends that Atlantic's penetration calculations are incorrect. Like the Town of Salamanca, the City submitted an alternative DBS penetration rate, derived from zip code+4 data it purchased from SBCA.<sup>79</sup> However, the City of Salamanca made several adjustments to the zip code+4 data. First, it reduced the number of satellite subscribers used in its calculations based on findings from a local government employee's visual inspection for satellite dishes.<sup>80</sup> Second, it adjusted its numbers by 15 percent (in contrast to Atlantic's adjustment by 10 percent), to account for dual subscribers.<sup>81</sup> Based on those two adjustments, the City calculated a DBS penetration rate of 11.9 percent.<sup>82</sup> Third, the City offered calculations based on a larger number of households, to reflect an 11 percent increase in household growth since 2000.<sup>83</sup> Calculations based on that adjustment,

---

<sup>71</sup> 47 C.F.R. §§ 76.911 & 76.905.

<sup>72</sup> See *supra*, ¶¶ 8-11.

<sup>73</sup> See *supra*, ¶¶ 9-11, 13.

<sup>74</sup> See *supra*, ¶¶ 9-10; see also City of Salamanca Petition for Reconsideration, Exh. B (Petition) at 4-5.

<sup>75</sup> See *supra*, ¶ 10; see also Opposition at 7; Opponents' Response at 11 n. 41.

<sup>76</sup> *In the Matter of Texas Cable Partners, L.P.*, 16 FCC Rcd at 4887 ¶3.

<sup>77</sup> A description of this calculation method is described above. See *supra*, ¶ 11.

<sup>78</sup> City of Salamanca Petition for Reconsideration, Exh. B (Petition) at 8-9 & Exh. H. Reducing subscriber totals by 10 percent, the City of Salamanca has 589 subscribers. The allocation percentages were derived by dividing the total number of franchise households (based on 2000 U.S. Census data) by the total number of five-digit zip code households (also based on data from the 2000 U.S. Census). The allocation percentage for the City of Salamanca was 83 percent. Thus, the total direct-to-home subscribers allocated to the franchise area for the City of Salamanca is 489. The penetration rate of 19.8 percent was calculated by dividing 489 direct-to-home subscribers allocated to the franchise area by 2469 total franchise households.

<sup>79</sup> Opponents' Response at 12; Opposition at 10.

<sup>80</sup> Opponents' Response at 14; Opposition at 11. The City of Salamanca stated that its visual inspection revealed that SBCA had over counted the number of satellite subscribers by 27.41 percent. *Id.*

<sup>81</sup> Opponents' Response at 15; Opposition at 11.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

plus the two described above, showed a DBS penetration rate of 10.7 percent.<sup>84</sup> Lastly, the City calculated a penetration rate based only on the latter two adjustments (for dual subscribers and population growth) arriving at a figure of 14.76 percent.<sup>85</sup>

21. Atlantic counters that its penetration figures are accurate and based on accepted Commission methodology. It urges the Commission to reject the City of Salamanca's figures for several reasons. First, Atlantic states that the City of Salamanca, like the Town, may have included zip codes outside its franchise area.<sup>86</sup> In addition, Atlantic states that the City of Salamanca's data is inaccurate because it may not include subscriber numbers from all parts of the City of Salamanca.<sup>87</sup> In addition, Atlantic states that Commission precedent does not permit the City of Salamanca to make the adjustments it made to the SBCA data. First, Atlantic states that the Commission does not accept data based on visual inspections made by the local government.<sup>88</sup> Second, Atlantic criticizes the City's 15 percent adjustment for dual subscribers. Atlantic states that its 10 percent adjustment rate is based on a methodology approved by the Commission, whereas the City's 15 percent figure is based solely on one single financial analyst's report.<sup>89</sup> Third, Atlantic asserts that even assuming that 15 percent is the correct adjustment rate, the City's numbers still reveal a penetration rate in excess of 15 percent.<sup>90</sup> Fourth, Atlantic states that the City improperly adjusted its figures to account for estimated population growth. Atlantic explains that the evidence submitted in support of the City's population growth – a declaration from an interested party in the dispute – does not provide accurate, verifiable data upon which the Commission can make a determination of effective competition.<sup>91</sup> It states that the Commission should not permit the City to use its proposed population growth adjustment figure because it is not publicly available and is an estimated figure that lies “in the sole subjective judgment of the Town Supervisor.”<sup>92</sup>

22. As discussed above, the City, like the Town of Salamanca, submitted evidence which allegedly shows that its zip code+4 data did correlate to City boundaries and reflects data from the entire franchise area.<sup>93</sup> In addition, the City states that its visual inspection of satellite dishes was proper because it increases the accuracy of the DBS penetration calculations.<sup>94</sup> It also stated that its adjustment for dual subscribers was proper, and that its estimated population growth figure was based on the best

---

<sup>84</sup> Opposition at 11.

<sup>85</sup> *Id.*; Opponents' Response at 14.

<sup>86</sup> City of Salamanca Petition for Reconsideration, Exh. B (Reply) at 14-16.

<sup>87</sup> *Id.* at 15-16. *See supra*, note 60.

<sup>88</sup> *Id.* at 17 (citing *Tri-Lakes Order*, 12 FCC Rcd 13170).

<sup>89</sup> *Id.* at 19. The City of Salamanca submitted an analyst report from Lehman Brothers in support of its argument that a 15 percent adjustment was preferable to a 10 percent adjustment. It also noted that SkyTrends, the company who provided the effective competition reports for the industry prior to SBCA, had been recommending a 15 percent error factor for dual subscribership since July of 2002. Opponents' Response at 15, n.58.

<sup>90</sup> City of Salamanca Petition for Reconsideration, Exh. B (Reply) at 19.

<sup>91</sup> *Id.* at 18.

<sup>92</sup> *Id.*

<sup>93</sup> *See supra*, ¶ 14; *see also* Opponents' Response at 13; Opponents' Response to Surreply at 4 & Exh. 3.

<sup>94</sup> Opponents' Response at 14.

available information.<sup>95</sup> Even if the population growth figure is excluded, the City states that the penetration rate still falls below 11.9 percent.<sup>96</sup>

23. As discussed above, we cannot accept the City of Salamanca's DBS penetration rate calculations because we cannot verify the accuracy of the underlying zip codes upon which the calculations were based.<sup>97</sup> Though this conclusion makes further discussion of the City's data adjustments moot, we will address the validity of the adjustments nonetheless given the amount of time that has passed since Atlantic filed its petition. Atlantic is correct in concluding that we do not accept data adjustments based on unverifiable visual inspections by the local government.<sup>98</sup> Atlantic is also correct in concluding that we do not accept data adjusted for estimated population growth when that estimate is not based on verifiable data.<sup>99</sup> We note, however, that, even were we to accept as reliable the City of Salamanca's adjusted household growth figure, Atlantic's penetration rate still exceeds the 15 percent threshold of the competing provider test.<sup>100</sup> Most relevant here, however, is our treatment of dual subscribers since Atlantic filed its petition. Historically, for figures derived from the five-digit zip code formula, we have accepted an adjustment for dual subscribers.<sup>101</sup> We accepted this data adjustment for the five-digit zip code formula based on past recommendations by SkyTrends, a data vendor and predecessor to SBCA.<sup>102</sup> However, in a later case, we concluded that a closer reading of Section 632 of the Communications Act showed that adjusting for dual subscribers "would permit an absurd finding of no effective competition where 85 percent of households were dual cable/DBS subscribers, as long as less than 15 percent of households subscribed only to DBS."<sup>103</sup> Here, Atlantic reduced its subscriber numbers to account for dual subscribers by 10 percent. Because we have accepted penetration rates under the five-digit zip allocation formula adjusted for dual subscribers, we accept Atlantic's figures here.<sup>104</sup> Further, we note that even if Atlantic had not made the dual subscriber adjustment, the DBS penetration rate in the

---

<sup>95</sup> *Id.* at 15.

<sup>96</sup> Opponent's Response at 15. The City of Salamanca states that without the adjustment for post-2000 population growth, the DBS rate is 11.9 percent. That figure incorporates the City's adjustment based on a visual inspection and on a 15 percent dual subscriber rate. *Id.*

<sup>97</sup> See *supra*, ¶ 15.

<sup>98</sup> See *Time Warner Entertainment Company Petition for Determination of Effective Competition*, 18 FCC Rcd 13043, 13045 ¶6, 13047 ¶10 (2004); *Cablevision of Paterson Determination of Effective Competition*, 17 FCC Rcd 17239, 17242-43 ¶7 (2002).

<sup>99</sup> The Commission will accept household data from sources other than the U.S. Census if the data provides "a sufficiently reliable basis for an effective competition determination." See *Charter Communications v. Thirteen Oregon Communities*, 20 FCC Rcd 10679, 10681 ¶6 (2005).

<sup>100</sup> SBCA reports 476 subscribers in the City of Salamanca. Dividing that number by the City's population adjustment of 2740.59 – the DBS penetration rate is 17.36 percent. See Opposition at 10-11.

<sup>101</sup> See *In re Time Warner-Advance Newhouse Partnership Petition for Determination of Effective Competition in Thirty-Three North Carolina Communities*, 20 FCC Rcd 5225, 5227 ¶ 7 (2005).

<sup>102</sup> *Id.* at 5228 ¶ 10, n. 30.

<sup>103</sup> *In re Mediacom Minnesota LLC, Petition for Determination of Effective Competition in Sixteen Minnesota Communities*, 20 FCC Rcd 4984, 4988 ¶13 (2005).

<sup>104</sup> We also note that even if we used the City's suggested 15 percent adjustment for dual subscribers, the penetration rate still exceeds 15 percent under the five-digit zip code formula. Atlantic documented that the City of Salamanca has 654 total subscribers, which adjusted by the City's suggested dual subscriber rate of 15 percent comes to 556 subscribers. Multiplying that figure by the 83 percent allocation ratio comes to 462, which when divided by 2,469 total franchise households shows a penetration rate of 18.7 percent. See City of Salamanca Petition for Reconsideration, Exh. B (Reply) at Exh. H.

City of Salamanca still exceeds 15 percent.<sup>105</sup> Thus, Atlantic has shown that the DBS penetration rate in the City of Salamanca exceeds the 15 percent threshold.

24. Atlantic satisfied the first prong of the competing provider test in the Town of Great Valley, the Village of Little Valley, the Town of Salamanca, and the City of Salamanca by demonstrating that the DBS providers offer comparable programming to at least 50 percent of those franchise areas. In addition, Atlantic has satisfied the second part of the competing provider test by establishing that the DBS providers serve at least 15 percent of those franchise areas. Based on the foregoing, we conclude that Atlantic has submitted sufficient evidence demonstrating that its cable systems serving those four franchise areas are subject to “competing provider” effective competition.

### III. ORDERING CLAUSES

25. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Atlantic Broadband (Penn) LLC relating to the Town of Great Valley, the Village of Little Valley and the Town of Salamanca, New York **IS GRANTED**.

26. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Atlantic Broadband (Penn) LLC **ARE REVOKED**.

27. **IT IS ALSO ORDERED** that the petitions for reconsideration filed by Atlantic Broadband (Penn) LLC regarding the certification of franchising authority to regulate basic cable service rates and initial finding of lack of effective competition relating to the Town of Little Valley and the City of Salamanca, New York **ARE GRANTED**.

28. This action is taken pursuant to authority delegated under Section 0.283 of the Commission’s rules.<sup>106</sup>

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold  
Deputy Chief, Media Bureau

<sup>105</sup> See *id.* The City of Salamanca’s total five-digit zip code direct-to-home subscribers, not adjusted for dual subscribers, is 654. Multiplying that figure by an 83 percent allocation ratio, the five-digit allocation formula shows that 543 direct-to-home subscribers exist in the City of Salamanca. Divided by 2,469 total franchise households, the DBS penetration rate is 22 percent.

<sup>106</sup> 47 C.F.R. § 0.283.